



**STATE OF NEW JERSEY**

**Board of Public Utilities**

*Two Gateway Center  
Newark, NJ 07102*

**ENERGY**

**In the Matter of the Verified Petition of Jersey Central )  
Power & Light Company, doing business as GPU )  
Energy, seeking (a) Approval of the Sale of Its ) **Decision and Order**  
Non-Nuclear Generation Assets and Certain )  
Additional Real and Personal Property, and the )  
Sublease of Other Certain Interests, Pursuant to )  
N.J.S.A. 48:3-7, (b) Specific Determination )  
Allowing the Non-Nuclear Generation Assets of )  
Jersey Central Power and Light Company, ) **Docket No. EM99020067**  
Metropolitan Edison Company, Pennsylvania Electric )  
Company To Be an Eligible Facility Pursuant to Section )  
32 of the Public Utility Holding Company Act of 1935 )  
and (c) a Waiver of the Advertising Requirements of )  
N.J.A.C. 14:1-5.6(b). )**

**(SERVICE LIST ATTACHED)**

**BY THE BOARD:**

In October 1997, GPU, Inc.<sup>1</sup> announced that it intended to commence a process to divest its fossil fuel and hydroelectric generation facilities. By Order Establishing Process and Procedures, dated January 23, 1998, the Board adopted procedures and a schedule for receiving comments and developing proposed general auction standards and review criteria that would be applicable when the Jersey Central Power and Light Company d/b/a GPU Energy (GPUE or Company) sought Board approval of any asset sales resulting from its planned divestiture.

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<sup>1</sup> Jersey Central Power & Light Company (JCP&L) and its affiliates, Metropolitan Edison Company (Met-Ed) and Pennsylvania Electric Company (Penelec) (collectively, the GPUE Companies) are public utility subsidiaries of GPU, Inc.

On June 16, 1998, after review of the comments received, the Board issued an Order Adopting Auction Standards (Auction Standards)<sup>2</sup> applicable to the sale of the Company's non-nuclear generating assets. The Auction Standards establish principles for maximizing the sales price for the assets, fostering a truly competitive bidding process by providing opportunities for many bidders to participate, continued environmental stewardship through the transfer of ownership of the generating assets, the mitigation of impacts on the incumbent workforces of the divesting company, and the maintenance of the electric system reliability. The Auction Standards require the divesting company to submit the proposed sale of the generating assets to the Board for review and approval, at which time the divesting utility will be required to demonstrate compliance with the Auction Standards, as well as other applicable laws, regulations and policies.

On February 16, 1999, the Company filed a petition with the Board seeking (a) approval of the sale of its non-nuclear generation assets<sup>3</sup> and certain real and personal property<sup>4</sup>, and the sublease of certain other interests<sup>5</sup> to Sithe Energies, Inc. (Sithe) pursuant to N.J.S.A. 48:3-7; (b) specific determinations allowing the non-nuclear generation assets of JCP&L and its affiliates, Met-Ed and Penelec to be Eligible Facilities pursuant to Section 32 of the Public Utility Holding Company Act (PUHCA); and (c) a waiver of the advertising requirement of N.J.A.C. 14:1-5.6(b).

On July 26, 1999, the Board adopted a procedural schedule in order to allow parties the opportunity to review and provide input to the Board regarding the pending sale of GPU's Three Mile Island Nuclear Generating Facility to AmerGen Energy Company LLC (AmerGen), and its Non-Nuclear generating assets to Sithe. The procedural schedule included an opportunity for parties to propound discovery, participate in a public/legislative type hearing, and submit post-hearing comments and reply comments to the Board.

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<sup>2</sup> Order Adopting Auction Standards, Docket Nos. EX94120585Y, EO97070457, EO97070460, EO97070463 and EO97070466.

<sup>3</sup> This includes the Gilbert 538 MW combined cycle generation facility, 8 simple-cycle combustion turbines (CT) at the Glen Gardner facility totaling 160 MWs, 2 steam turbine and 4 CTs located at the Sayreville generation facility totaling 453 MWs, 4 CTs located at the Werner facility totaling 212 MWs, Forked River's 68 MW CT facility, and the JCP&L's 16.67 ownership in the KeyStone (Keystone) 1,170 MW coal-fired generation facility located in Selocta, Pennsylvania.

<sup>4</sup> This includes: the Atlantic substation site, East Flemington Substation site, Gilbert Terminal Facility, H.C. Theurk Site, Pequest River Substation site, Pohatcong Substation site, and the assets comprising the GPU System Chemistry/Materials Lab.

<sup>5</sup> This includes the 251 acre-feet storage capacity in the Merrill Creek Reservoir and the possible sublease to Sithe of additional storage capacity in Merrill Creek from time to time.

On August 20, 1999, a Public/Legislative Type Hearing was held at the Board, before Commissioner Fredrick F. Butler, regarding both the pending sale of GPU's non-nuclear generating assets to Sithe, and GPU's Three Mile Island Unit I nuclear generating facility to AmerGen. At the hearing, the Company presented testimony by David C. Brauer, Vice President, Strategic Initiatives for GPU Service Inc.<sup>6</sup> and the Ratepayer Advocate (RPA) presented testimony by its expert, Mathew Kahal. The Company's witness was questioned by Commissioner Butler and Board Staff on a number of issues regarding the proposed sale to Sithe, including environmental liabilities, workforce impacts, reliability issues, and the allocation of the bid proceeds to New Jersey.

On August 27, 1999, the Board received written comments from GPUE and the RPA, with both parties filing reply comments with the Board on September 23, 1999.

### **Terms of the Proposed Non-Nuclear Generating Assets Sale:**

On October 29, 1998, the Company entered into a Purchase and Sale Agreement (PSA) and related agreements with Sithe, providing for the sale of its non-nuclear generation assets and real property located in New Jersey to Sithe for approximately \$187 million, subject to certain adjustments<sup>7</sup>. The Company will convey to Sithe all of its right, title and interest in and to all of the assets constituting, or used in and necessary for the operation of, the generation assets, including, among other things, the real property upon which the generation assets are sited, all inventories, machinery, equipment, contracts, vehicles, fixtures and furniture, transferable permits, all books, records and operating manuals, agreements relating to the ownership, operation or maintenance of such assets and transferable warranties and guarantees.

On October 29, 1998, the Company, Met-Ed and GPU, Inc also executed a PSA and related agreements providing for the sale to Sithe of (a) the Company's 16.67% interest in Keystone, (b) Met-Ed's 16.45% interest in the Conemaugh (Conemaugh) Generating Station, and (c) all of the 2500 shares of common stock of GPU Generation, Inc. (Genco)<sup>8</sup> for a total price of approximately \$547 million, subject to certain adjustments prior to the date of closing (Keystone/Conemaugh PSA). The Company will receive approximately \$255 million of the Keystone/Conemaugh purchase price for its interest in Keystone. Under the Keystone/Conemaugh PSA, the Company will convey to Sithe all

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<sup>6</sup> GPU Service Inc. is a subsidiary of GPU, Inc.

<sup>7</sup> The Company's affiliates Met-Ed and Penelec also executed a PSA with Sithe on October 29, 1998, for their respective generation units and certain other undeveloped parcels of land located in Pennsylvania.

<sup>8</sup> Genco is a wholly-owned subsidiary of GPU, Inc. responsible for the operation and maintenance of the GPUE Companies' non-nuclear generation assets.

of its rights, title and interest in and to its 16.67% interest in the assets constituting, or used in, and necessary for the operation of, Keystone, including, among other things, the real property upon which Keystone is sited, all inventories, machinery, equipment, contracts, vehicles, fixtures and furniture, transferable permits, all books, records and operating manuals, agreements relating to the ownership, operation or maintenance of such assets and transferable warranties and guarantees.

The Company and Sithe have also entered into a Transition Power Purchase Agreement (TPPA) simultaneously with the execution of the PSA and the Keystone/Conemaugh PSA. The TPPA is an option agreement for the purchase and sale of electric generation capacity, but not for electric energy or ancillary services. The TPPA runs from the closing date through May 31, 2002, during which time the Company will have the option to purchase Contract Capacity (as defined in the TPPA) from Sithe (call option) and, similarly, Sithe will have the option to require that the Company purchase such Contract Capacity (put option). The call option prices range from \$69.60/MW-Day in 1999 to \$120.00/MW-Day in 2002 and put option prices range from \$54.80/MW-Day in 1999 to \$93.00/MW-Day in 2002.

Under both the PSA and the Keystone/Conemaugh PSA, and in accordance with the Auction Standards, Sithe will assume all on-site environmental liabilities to the extent permitted by applicable laws. Certain off-site liabilities, specifically related to past disposal of coal ash, are retained by GPU. In addition the PSA and the Keystone/Conemaugh PSA also provide for certain price adjustments to be made to the respective purchase prices.

With respect to the impact on employees, GPUE indicates that it undertook a voluntary early retirement plan before the auction process even started, thereby attempting to address some of the inevitable and necessary downsizing impacts pre-sale. Pursuant to both the PSA and the Keystone/Conemaugh PSA, Sithe will assume the current collective bargaining agreements for those union employees that accept employment with Sithe. Sithe has agreed, based on its union and non-union staffing requirements, to make a reasonable effort to offer employment to union and non-union employees currently employed at, or in support of, the stations it is purchasing, to meet staffing requirements. The PSA calls for such offers of employment to be extended by Sithe at least 60 days prior to the closing date. Indeed, GPUE has indicated that approximately 90 percent of the incumbent workforce has been provided offers. Sithe is also required to adopt pension and other employee benefit plans for these union employees that provide benefits substantially equivalent to the Company's current plans. Non-union employees that accept employment with Sithe will receive credit for all time employed by the Company or its affiliates or other GPU, Inc. subsidiaries under Sithe's various employees benefit plans programs and arrangements in which such employees may become participants. Those employees that are not offered positions with Sithe will be eligible for a severance package. The GPUE Companies will be responsible for up to \$20 million in severance payments for non-union employees (with the Company's share being approximately \$7 million), and Sithe will assume responsibility for any additional severance payments, that become due as a result of the sale of the generation assets. Sithe will also be responsible for certain retirement program costs. The Company and its

affiliates will retain responsibility for voluntary early retirement program costs for eligible union and non-union employees who have elected to accept such offers. As indicated by the Company's witness during the August 20, 1999 hearing, the affected bargaining unit has voted to approve the transition plan (Tr.8/20/99 at 23).

### **Positions of the Parties:**

The Company asserts that it conducted the sale process related to its non-nuclear generation assets in accordance with the Board's directives and in compliance with the Board's Auction Standards. The Company explains that it complied with the Auction Standards as follows: its auction process was designed to foster competition among bidders, ensure a maximum sales price and encourage bidder flexibility; bidder qualifications were reasonable and not unduly restrictive; the final bidding process was of a size adequate to assure sufficient competition for any individual or bundle of plants; all prospective bidders had access to relevant information; a market power study was filed with the Board; the Company has ensured system reliability and provision of safe, adequate and reliable service post-divestiture, by requiring Sithe to become a member of PJM, in addition to each of the GPUE Companies entering into TPPAs and Interconnection Agreements with Sithe; unless prohibited by applicable law, all on-site environmental liabilities will be assumed by Sithe; Sithe has represented in its Final Bid that it has a strong history of environmental compliance, and that it has not received any formal notices of violation of environmental permits by any local, state, or federal environmental authorities applicable to the ownership or operation of electric generation facilities in the past five years; and the sale process provides for a reasonable transition plan for the incumbent generation workforce.

Regarding selection of the winning bidder, the Company indicates that the Sithe Final Bid was selected as the winning bid because Sithe offered the highest price for all of the GPUE Companies generation assets, including Met-Ed's interest in Conemaugh and the Company's interest in Keystone. The Company asserts that the Sithe bid and allocation of \$187 million for the New Jersey located generation assets and \$255 million for the Company's interest in Keystone, for an aggregate purchase price of \$422 million (approximately 1.8 times book value ) represents fair market value for the New Jersey located generation assets and the Company's interest in Keystone.

The RPA in its initial comments stressed the need for, and urged the Board to hold an evidentiary hearing, for the purpose of establishing a comprehensive record upon which to base its ruling in this matter, since the result of the sale will ultimately impact the rates paid by the Company's ratepayers.

The RPA's expert witness testified that the RPA does not take issue with the conduct of the auction process nor with the selection of Sithe as the winning bidder. However, it contests the proposed allocation of the proceeds from the sale of the Company's non-nuclear generating assets, since the RPA claims that the proposed allocation will adversely impact the Company's ratepayers. The RPA argues that by excluding the

Keystone and Conemaugh plants, the proposed allocation would yield a net result that would saddle the Company's New Jersey's ratepayers with stranded costs amounting to \$37.5 million, while the Pennsylvania ratepayers of the Company's affiliates would obtain a stranded benefit. As such, the RPA argues that the Company's proposed allocation of the sale proceeds is unreasonable and that the Board should reject the Company's proposed allocation, and instead, adopt an allocation which is fairer to New Jersey ratepayers and which more realistically reflects the true market value of the Company's non-nuclear generating assets.

The RPA also asserts that the Company does not propose to return to ratepayers the federal income tax benefits associated with the divested assets. The RPA points out that the tax benefits at issue include the Investment Tax Credit (ITC), Excess Deferred Income Taxes (EDIT) associated with changes in the corporate tax rate, and Accumulated Deferred Income Taxes (ADIT) associated with timing differences between tax and book accounting, namely, timing differences associated with accelerated tax depreciation. The RPA argues that the Company's position is unsupported by the record and its narrow reading of the relevant tax law should not be accepted absent further review and additional information. Thus, the RPA recommends that the Board should order the Company to seek an IRS private letter ruling on these tax issues.

### **Discussion and Findings:**

At the outset, we wish to address and reject the contention of the RPA that an evidentiary hearing should have been held in this matter to develop a full record. Based on our review of the requirements of the Act, the procedures which have been followed and the record which has been developed in this matter, we are convinced that a thorough record has been developed and that all parties, including the RPA, have had an opportunity through discovery, public/legislative hearings, including the presentation of expert testimony, and comments and reply comments to the Board, to review and explore the underlying facts regarding the Company's proposal, and to present their factual, policy and legal concerns to the Board regarding the proposed sale, the allocations of proceeds and other issues of concern.

The Board's review of the proposed sale of the Company's non-nuclear generation assets is based on whether the auction process was conducted in accordance with the Board's Auction Standards, and whether the Company has met the provisions set forth in section 11 of the Electric Discount and Competition Act (N.J.S.A. 48:3-59). The Board has carefully reviewed the Company's submission, the discovery responses, the transcript from the public/legislative type hearing, as well as the comments and reply comments submitted by the Company and the RPA. After considering the record in this matter, and for the reasons set forth below, the Board concludes that the Company has met the requirements for approval of the proposed sale. The Board believes, however, that it is appropriate to address some of the concerns raised in the public/legislative type hearing and the written comments regarding the allocation of Sithe's total purchase price to the

Company's New Jersey located generation assets, as well as the Company's proposed treatment of the federal income tax benefits associated with the divested assets.

Our review of the record for compliance with the Auctions Standards indicates the following:

The first Auction Standard requires that the auction process must be designed to foster competition among bidders, ensure maximum sales price, thereby minimizing stranded costs, and encourage bidder flexibility. The process must be designed in a way to maintain necessary confidentiality in order to restrict the possibility of gaming and to maintain an optimal situation for the development of a comprehensive energy supply market for competition. The process must also consider the costs incurred. The auction should be structured to maximize the sale price while reasonably managing costs, administrative and otherwise. The auction process should permit sufficient flexibility so that bidders may bid on a number of generating site combinations, unless the company can demonstrate justification for a packaged bidding structure for certain plants. Any grouping of assets for sale should balance such considerations as market demand from perspective buyers, asset characteristics, projected price, stranded costs considerations, and market power issues. In the case where packaging is permitted, bidders must still have had the ability to bid on any individual generation site or sites.

- The GPUE Companies sent interest letters to over 300 potential bidders. Based upon indications of interest received, the GPUE Companies sent request for qualifications (RFQs) together with a Confidentiality Agreement to over 100 parties. The GPUE Companies then provided a Offering Memorandum to the 64 qualified bidders that had executed a Confidentiality Agreement. Each of the qualified bidders was provided with a set of CD-ROMS which contained detailed technical information, operating and financial information on each generation facility. At the next stage of the auction, qualified bidders were permitted to submit Indicative Bids for any or all of the GPUE Companies' generation assets, for which the GPUE Companies received 50 Indicative Bids from 31 bidders. Based on the GPUE Companies' review of the Indicative Bids, 17 short-listed bidders were selected, based primarily on the level and completeness of the Indicative Bids. Asset bundles were then developed by the GPUE Companies and defined for the Final Bids based on bidder preferences, including geographic considerations and fuel type. At the Final Bid Stage, in addition to allowing short-listed bidders to submit final bids for assets for which they had been short-listed, Final Bidders were also permitted to submit bids that did not prescribe to the bid packages identified by the GPUE Companies, for which the GPUE Companies retained the sole discretion to review. Ultimately, Sithe's Final Bid was selected, given that Sithe offered the highest price for all of the GPUE Companies' generation assets.

The second Auction Standard requires that bidder qualifications should be reasonable and not unduly restrictive. Qualifications may include such criteria as financial capability; regulatory or other legal requirements, experience in ownership, operation and decommissioning of nuclear generating facilities; labor and industrial relations experience; and relevant safety, environmental and community involvement track

records. Prospective bidders must be required to indicate the intended use of the facilities.

- The GPUE Companies conducted the request for qualifications (RFQ) to assess potential bidders based upon their financial capability, relevant experience and expertise and ownership or operation of generation facilities, industrial and labor relations, environmental management and community involvement. Each of the prospective bidders also was required to indicate the intended use of the facilities in the response to the RFQ. The GPUE Companies did not reject prospective bidders for failure to satisfy the GPUE Companies qualifications.

The third Auction Standard requires that any “short list” or final bidding group must include enough participants to provide assurance that there is sufficient competition for any particular bundle or individual plant.

- The GPUE Companies selected 17 short-listed bidders based on the level and completeness of their Indicative Bids.

The fourth Auction Standard requires that GPU Energy must ensure that access to all relevant information is provided to all prospective bidders (this may include, but will not necessarily be limited to plant and site data; transmission and fuel supply infrastructure; interim buyback requirements, if any; State and federal regulatory requirements; relevant market information, environmental, decommissioning, and other liabilities; labor responsibilities; industry and market analysis; and treatment of emission credits). Bidders should be provided with appropriate access to relevant documentation and key personnel to perform necessary due diligence investigations. The bidders should also be informed about regulatory and commercial terms of sale in order to make informed decisions and correctly analyze the value of the assets being offered.

- In order to facilitate the qualified bidder’s due diligence review, the GPUE Companies provided qualified bidders with CD-ROMS containing detailed technical, operating and financial information on each generation facility. In addition, the GPUE Companies the provision of forms of agreements detailing the transaction terms, as well as informing qualified bidders regulatory and commercial terms of sale. The GPUE Companies opened a secure “web site” through which Qualified Bidders were able to pose due diligence questions and to obtain responses and access to additional information. In addition, meetings for the Qualified Bidders were held with the GPUE Companies, Genco personnel and their legal and financial advisors regarding any aspect of the auction or the generation assets being sold.

The fifth Auction Standard requires the divesting company, upon completion of the auction and as part of its request for approval, to submit a market power analysis for regulatory review. GPU Energy must demonstrate that the sale of the generating facilities will not create or enhance market power in the relevant market, and should take into account the effect of any identified load pockets. The Board will give particular



attention to any buyer which currently owns or controls electric generation assets in the State of New Jersey.

- GPUE has asserted that other than Sithe's indirect interest in two small projects, one in New Jersey and one in Pennsylvania, neither Sithe nor its affiliates presently own or control any electric generation or transmission assets within the Pennsylvania-New Jersey-Maryland (PJM) Interconnection Control Area. In addition, on April 7, 1999, as part of its filing in this proceeding, the Company submitted a market power analysis prepared by Dr. William Hieronymus of Putnum, Hayes & Bartlett, Inc. Dr. Hieronymus' results indicate that Sithe cannot exercise generation market power in the relevant geographic market. He also concludes that Sithe is not in a position to erect barriers to entry to competing suppliers. As such, Dr. Hieronymus concludes that the GPUE Companies' sale of these generation assets and related jurisdictional transmission facilities to Sithe will not adversely impact competition in the relevant product and geographic markets.

The sixth Auction Standard requires that the divesting company demonstrate that it has adequately provided for system reliability and the provision of safe, adequate and reliable service post-divestiture. GPU Energy must demonstrate that there will be an entity or structure in place for it to meet the reasonably anticipated load requirements (including basic generating service) through retail phase-in, and provide local area support, if necessary. The buyer should commit to adhere to requirements of the local control area independent system operator entity and all applicable operational and reliability standards.

- The GPUE Companies and Sithe have entered into a Transition Power Purchase Agreement (TPPA) simultaneously with the execution of the PSA and the Keystone/Conemaugh PSA. The TPPA is an option agreement for the purchase and sale of electric generation capacity, but not for electric energy or ancillary services. The TPPA runs from the closing date through May 31, 2002, during which time the Company will have the option to purchase Contract Capacity (as defined in the TPPA) from Sithe (call option) and, similarly, Sithe will have the option to require that the Company purchase such Contract Capacity (put option). The call option prices range from \$69.60/MW-Day in 1999 to \$120.00/MW-Day in 2002 and the put option prices range from \$54.80/MW-Day in 1999 to \$93.00/MW-Day in 2002. In addition, Sithe and the Company have entered into an Interconnection Agreement in order to assure that Sithe will have access to the transmission system in order to sell power generated by the generation assets and to provide for related interconnection services between the generation assets and the Company's substations.

The seventh Auction Standard requires that, absent a showing by the divesting company that retention of such liabilities provides a substantial risk-adjusted benefit to ratepayers, all on-site environmental liabilities associated with auction property shall be assumed by the purchaser unless otherwise required by applicable local, State and federal laws. The buyer(s) shall comply with all safety and environmental standards as

embodied in existing State and federal statutes and regulations and associated permits, and as subsequently modified through legislative or regulatory actions.

- Under both the PSA and the Keystone/Conemaugh PSA, and in accordance with the Auction Standards, Sithe will assume all on-site environmental liabilities to the extent permitted by applicable laws.

The eighth Auction Standard requires all bidders on the short list, or in the final bidding group, to submit to GPU Energy, on a confidential basis, a disclosure of all formal notices of violation of local, State and federal environmental permits applicable to the ownership or operation of electric generating facilities for the past five year period. The safety and environmental performance record for the proposed buyer shall be submitted and made public as part of the petition by GPU Energy for approval of the sale.

- Sithe, in its Final Bid, represented to the GPUE Companies that it has a strong history of environmental compliance and that it has not received any formal notices of violation of environmental permits by any local, state, or federal environmental authorities applicable to the ownership or operation of electric generation facilities for the past five years.

The ninth Auction Standard requires that the divestiture petition must include a reasonable transition plan, plus a system of reporting such plans, for the incumbent generation workforce, including, but not limited to, assurances that existing pension and other post-retirement benefits and entitlements accrued through the date of sale are protected, and also must include requirements that the buyer assume any existing collective bargaining agreements covering union employees associated with these facilities. In addition, the divesting company is expected to assist employees (both union and non-union) in obtaining positions with the buyer(s).

- Pursuant to both the PSA and the Keystone/Conemaugh PSA, Sithe will assume the current collective bargaining agreements for those union employees that accept employment with Sithe. Sithe will also, based on its union and non-union staffing requirements make a reasonable effort to offer employment to union and non-union employees currently employed at, or in support of, the stations it is purchasing, to meet staffing requirements. The PSA requires that for such offers of employment must be extended by Sithe at least 60 days prior to the closing date. Sithe is also required to adopt pension and other employee benefit plans for these union employees that provide benefits substantially equivalent to the Company's current plans. Non-union employees that accept employment with Sithe will receive credit for all time service with the Company or its affiliates or other GPU Inc. subsidiaries under Sithe's various employees benefit plans programs and arrangements in which such employees may become participants. The GPUE Companies will be responsible for up to \$20 million in severance payments for non-union employees (with the Company's share being approximately \$7 million), and

Sithe will assume responsibility for any additional severance payments that become due as a result of the sale of the generation assets. Sithe will also be responsible for certain retirement program costs. The Company and its affiliates will retain responsibility for voluntary early retirement program costs for eligible union and non-union employees who have elected to accept such offers.

The tenth Auction Standard requires that upon completion of the auction process and with its petition for approval of the sale, the divesting company GPU Energy shall submit a complete and accurate summary of the auction proceedings and outcome. The divesting company must be prepared to provide to the Board in writing the rationale behind the exclusion of any prospective bidder at each stage of the action process.

- The Company had indicated that it has provided the Board with a complete accurate summary of the auction proceedings with its verified petition, the Company has also indicated that it is fully prepared to respond to any request for information regarding its auction process.

Based on the foregoing, the Board concludes that the Company's auction process is consistent with the intent of the Board's Auction Standards, in that its auction process has maximized the sale price for the assets, has fostered a truly competitive bidding process by providing opportunities for many bidders to participate, and continued environmental stewardship through the transfer of ownership of the generating assets, the mitigation of impacts on the incumbent workforces of the divesting companies, and the maintenance of the electric system reliability. As such, the Board **HEREBY FINDS** that the Company has complied with the Board's requirement to submit the proposed sale of its generating assets to the Board for its review and approval, and that the Company has satisfactorily demonstrated compliance with the Board-approved Auction Standards. In light of our finding that the Company has complied with the Auction Standards, we also **HEREBY WAIVE** the advertising requirements as set forth in N.J.A.C. 14:1-5.6(b), as this requirement has been fulfilled by the Company's compliance with the aforementioned Auction Standards.

Section 11(b) in the Act, N.J.S.A 48:3-59(b), requires that prior to the commencement by an electric public utility of the solicitation of bids for the sale of its generating assets subject to recovery pursuant to sections 13 and 14 of the Act, the Board shall establish standards for the conduct of such a sale by the utility. The Act indicates that such standards shall include provisions for the Board to monitor the progress of the bid process to ensure that the process is conducted by parties acting in their best interest and in a manner designed to ensure a fair market value determination and does not unreasonably preclude participation by prospective purchasers. Section 11(b) further requires that the standards adopted by the Board shall include provisions that: (1) recognize the existing employees bargaining unit, and shall continue to honor and abide

by an existing collective bargaining agreement for the duration of the agreement. The new entity shall be required to bargain in good faith with the existing collective bargaining unit when the existing collective bargaining agreement has expired; (2) hire its initial employee complement from qualified employees of the electric public utility employed at the generating facility at the time of the functional separation or divestiture; and (3) continue such terms and conditions of employment of employees as are in existence at the generating facility at the time of the functional separation or divestiture.

The Act further includes provision in Section 11(c), N.J.S.A. 48:3-59(c), requiring that prior to completing the sale of generating assets subject to recovery pursuant to Sections 13 and 14 of the Act, an electric public utility shall file and obtain approval by the Board for the sale, subject to the following provisions: (1) the sale reflects the full market value of the assets; (2) the sale is otherwise in the best interest of the electric public utility's ratepayers; (3) the sale will not jeopardize the electric power system; (4) the sale will not result in undue market control by the prospective buyer; (5) the impacts of the sale on the utility's workers have been reasonably mitigated; (6) the sale is consistent with standards established by the Board in section 11(b) of the Act; (7) the sale includes provisions that the purchasing entity shall recognize the existing employee bargaining unit and shall honor and abide by any existing collective bargaining agreement for the duration of the agreement; (8) the sale of the generation assets includes a provision that the purchasing entity shall hire its initial employee complement from among the employees who are employed at the generation facility at the time of the sale; and (9) the sale of the generation assets includes a provision that the purchasing entity shall continue such terms and conditions of employment of employees as are in existence at the generating facility at the time of the sale.

A review of the record as to whether the sale of the Company's generation assets to Sithe reflects the full market value of the assets indicates that in the Final Bid Stage, the GPUE Companies received a bid, in the amount of \$1.545 billion, for the entire portfolio of assets, including all of the New Jersey based oil and gas generating units, the Pennsylvania based oil, gas and coal units, and the Company's minority share of the Keystone and Met-Ed's minority share of the Conemaugh coal-fired units. The GPUE Companies ultimately selected the Sithe bid because it represented the highest total price for all assets, as compared to bids received on specific bundles of assets. Importantly, there were no other bids received at all, either stand-alone or as part of a larger package, for the Keystone and Conemaugh units. It is presumed that this is because, in both cases, the Company and Met-Ed own only minority shares in these units, respectively. Only after the selection of Sithe as the winning bidder did the GPUE Companies request and receive a breakdown of the total bid by major jurisdictional bundle, i.e. Keystone/Conemaugh, New Jersey oil/gas, Penelec, and Met-Ed. That allocation, as

reflected in the filing, shows that the purchase price for the jurisdictional units as follows<sup>9</sup>:

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<sup>9</sup> This allocation reflects an upward adjustment to the total purchase price, which is the result of an negotiation over the aggregate final bid between the GPUE Companies and Sithe. As a result, the total purchase price is \$1.680 billion.

	<u>Price (\$millions)</u>	<u>MWs</u>	<u>\$/kw</u>
<b>JCP&amp;L:</b>			
NJ Gas/Oil Fired	187.2	1,429	131
Keystone	<u>255.2</u>	<u>285</u>	<u>895</u>
	442.4	1,714	258
<b>Met-Ed:</b>			
Met-Ed Bundle	385.8	1,063	363
Conemaugh	<u>291.5</u>	<u>282</u>	<u>1,034</u>
	677.3	1,345	504
<b>Penelec:</b>			
Penelec Bundle	560.6	1,345	417

As shown, Sithe provided an allocation of its total purchase price among the Company's Pennsylvania affiliates' generating assets and the Company's New Jersey based generation assets. The allocation provides of \$187 million to be allocated for the New Jersey based generation assets and \$255 million for the Company's interest in Keystone, for a total allocation or a aggregate purchase price of \$422 million, approximately 1.8 times book value.

The RPA asserts that the \$187 million allocated to the New Jersey based generation assets does not reflect the full market value for these units, since the allocation seems to favor the Company's Pennsylvania affiliates. This concern was compounded by the fact that another final bid on just the New Jersey oil/gas units that exceeded Sithe's allocation by \$103 million (i.e. a final bid on the Company's oil/gas units in the amount of \$290 million was received). The RPA in its comments argues that the allocation of the sales proceeds is unduly preferential to the customers of the Company's Pennsylvania affiliates. The RPA asserts that the Company's customers are being deprived of \$103 million of the sales benefits, reflecting the maximum market value for the New Jersey located assets, which it asserts is not consistent with the intent of the Board's Auction Standards and the Act. The RPA has emphasized that what is at issue here is not the Company's choice of Sithe as the winning bidder, but the allocation of Sithe's winning bid.

For the reasons set forth above, the Board has determined that the auction process was completed in a manner consistent with the Board's Auction Standards and the Act. The selection of Sithe as the winning bidder, which was the only option that would have resulted in a sale of all of the generation assets, resulted in the maximum divestiture proceeds for all of the Company's owned non-nuclear generation assets from the bids received, and is reasonable.

The relatively small difference between the amount apportioned by Sithe to the Met-Ed share of Conemaugh, versus the Company's share of Keystone, can be explained by virtue of the fact that Conemaugh has scrubbers installed, whereas Keystone does not. Accordingly, the allocation issue boils down to the allegedly skewed apportionment of the non Keystone/Conemaugh portion of the bid between the Company, Met-Ed and Penelec bundles.

The Board has reviewed the record in this proceeding regarding this issue, including the positions of the RPA, and is convinced that it is inappropriate to solely focus on the allocation price of \$187 million for the New Jersey located generation assets without taking into consideration other aspects of the winning bid. The Board agrees with the Company that when the allocation issue is viewed in the proper context, by assessing the overall sale of all the Company's non-nuclear assets, the broader picture is significantly different and the Sithe bid provides a fair assessment of the market value of the Company's generating assets. While it is true that a bid for the New Jersey based assets was received at a price (\$290 million) well above the value placed by Sithe, no corresponding separate bid was received on the Company's share of Keystone. We find that the \$442 million aggregate purchase price to be paid to the Company for its generating assets, including Keystone, represents approximately 1.8 times book value, which, we believe, represents the full market value resulting from the auction process for the Company's non-nuclear generating assets.

Moreover, in comparing the value assigned by Sithe to the New Jersey based assets versus the Penelec and Met-Ed assets, it is important to bear in mind that the Company's assets are comprised entirely of oil and/or gas fired steam units and combustion turbine capacity, much of which is fairly old. By comparison, the Penelec and Met-Ed capacity is primarily coal-fired (approximately 80% and 70% respectively). It is to be expected that coal-fired capacity would fetch a substantially higher price than oil and gas fired capacity. Further, while the RPA is correct that, when focusing solely on the New Jersey located assets, the allocated purchase price will result in a remaining net stranded cost (received price less than book value – prior to the application of transaction costs) of some \$37 million, the net stranded benefit (excess of sale price over net book value) associated with the allocated sale price of Keystone is approximately \$175 million. Thus, based on the above, considering the entire New Jersey transaction as a whole, the proposed transaction will result in a net stranded benefit for New Jersey customers. The Board **HEREBY FINDS** that the sale of the Company's non-nuclear generation assets to Sithe reflects the full market value of the assets and is in the best interest of the Company's customers, and **HEREBY APPROVES** the sale of the Company's non-nuclear generation assets in the amount of \$442 million, including the Company's interest in Keystone in the amount of \$255 million and the Company's New Jersey based assets in the amount of \$187 million, certain real property, and the sublease of certain other interest to Sithe pursuant to N.J.S.A. 48:3-7.

Based on the forgoing, the Board concludes that the Company has satisfactorily complied with the provisions of the Act in Sections 11(b) and 11(c). As indicated above by the Board, the Company has satisfactorily demonstrated compliance with the Board's Auction Standards that were adopted by the Board prior to the solicitation of bids for the sale of the Company's non-nuclear generating assets as required in section 11(b) of the Act. Based on our review of the record summarized above **WE FIND** that the sale of Company's non-nuclear generation assets to Sithe reflects the full market value of the assets; is in the best interest of the Company's customers; will not jeopardize reliability; will not result in undue market control by Sithe in the generation market; complies with the Board's Auction Standards; and fully and adequately address the employee related standards addressed in the Act. As such, the Board **HEREBY FINDS** that the auction process selecting Sithe as the winning bidder for the sale of its non-nuclear generation assets is appropriate and complies with the provisions set forth in sub-sections 11(b) and 11(c) of the Act for the divestiture of a utility's generation assets.

In addition, as part of the filing, the Company is seeking approval of the TPPA entered into by the Company and Sithe. The call option prices range from \$69.60/MW-Day in 1999 to \$120.00/MW-Day in 2002 and put option prices range from \$54.80/MW-Day in 1999 to \$93.00/MW-Day in 2002. These prices are in a range consistent with the capacity prices used in the determination of the average shopping credit approved for the Company by the Board<sup>10</sup>. As a result, these capacity prices that are specified in the TPPA are in the best interest of the Company's customers since they will help insulate the Company from price spikes that may occur from time-to-time as it serves basic generation customers, and which otherwise could ultimately be passed on to customers. Accordingly, the Board **HEREBY FINDS** that the TPPA entered into by the Company with Sithe to be in the public interest, in accordance with applicable law, and the rates specified therein and the costs resulting therefrom to be reasonable and prudently incurred by the Company throughout the full term of the TPPA (which runs through May 31, 2002), and we **HEREBY PERMIT** the Company to flow through and/or full and timely recover the costs resulting therefrom as part of its Basic Generation Service.

With respect to the determination of the net divestiture proceeds and their reflection in the Company's rates, the RPA asserts that the Company does not propose to return to ratepayers the federal income tax benefits associated with the divested assets, as such depriving the Company's customers the full benefits of the auction process. The RPA notes that the tax benefits at issue include the Investment Tax Credit (ITC), Excess Deferred Income Taxes (EDIT) associated with changes in the corporate tax rate, and Accumulated Deferred Income Taxes (ADIT) associated with timing differences between tax and book accounting, namely, timing differences associated with accelerated tax depreciation. The RPA argues that the Company's position is unsupported by the record

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<sup>10</sup> Board Summary dated May 24, 1999, Docket Nos. EO97070458, EO97070459, and EO97070469.



and its narrow reading of the relevant tax law should not be accepted, absent further review and additional information. Thus, the RPA recommends that the Board should order the Company to seek an IRS private letter ruling on the tax issues.

The Board agrees with the RPA's concerns on these tax issues, including the RPA's recommendation that the Board require the Company to request a private letter ruling with the IRS. If favorable, the requested ruling, which could be based on the arguments advanced in a similar request ordered by the Connecticut Department of Utility Control in connection with the divestiture of United Illuminating Company's Bridgeport Harbor and New Haven Harbor generating stations, would allow the benefits associated with the remaining balances of deferred income and investment tax credits to continue to be flowed through to ratepayers. Thus, the Board **HEREDY ORDERS** the Company to file for a private letter ruling with the IRS regarding these tax issues and accordingly our final determination of the net proceeds and stranded benefits (the post-closing true-up proposed by the Company on page 26 of the Petition) shall await the out come of this ruling.

Finally, the Company maintains that, as a condition to closing of the purchases by Sithe of the Company's New Jersey based generation assets, Keystone, Conemaugh and the Pennsylvania generation assets, the PSA, the Keystone/Conemaugh PSA, the Purchase and Sale Agreements between Met-Ed and Sithe, and Penelec and Sithe all provide that Sithe must qualify as an exempt wholesale generator (EWG)<sup>11</sup>, which will exempt Sithe from regulation under PUHCA. Under Section 32 of PUHCA, certain generators of electricity may apply to the FERC to qualify for EWG status. In order for the Company's New Jersey based generation assets, Keystone, Conemaugh and the Pennsylvania generation assets to be considered eligible facilities by FERC under Section 32 of PUHCA,

(c) ... every State commission having jurisdiction over any such rate or charge must make specific determination that allowing such facility to be an eligible facility (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law; [p]rovided, [t]hat in the case of such a rate or charge which is a rate or charge of an affiliate of a registered holding company:

(A) such determination with respect to the facility in question shall be required from every State Commission having jurisdiction over the retail rates and charges of the affiliates of such registered holding company....[15 U.S.C. §79z-5a(c)]

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<sup>11</sup> Section 32(a) of PUHCA defines an EWG as any person determined by the [FERC] to be engaged directly, or indirectly through one or more affiliates ..., and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale....

Because GPU, Inc. is a registered holding company under PUHCA and rates for electric energy produced by the Company's New Jersey based generation assets, Keystone, Conemaugh and the Pennsylvania generation assets were in effect under New Jersey and/or Pennsylvania law as of October 24, 1992 (the date of the enactment of Section 32 of PUHCA), each State commission having jurisdiction over the retail charges of the affiliates of GPU, Inc. must make such determination with respect to all of the generating facilities being sold by the GPUE Companies, regardless of the particular GPUE Company owning such plants<sup>12</sup>. Petitions will be filed with the FERC by the GPUE Companies seeking authorization for the sale of the Company's New Jersey based generation assets, Keystone, Conemaugh and the Pennsylvania generation assets insofar as such transactions are subject to the jurisdiction of that agency.

Having reviewed the Company's submission in this matter, it appears that the sale of the Company's New Jersey non-nuclear generation assets, including its interest in Keystone, the Met-Ed generation assets, including Met-Ed's interest in Conemaugh and the Penelec generation assets, will not adversely affect either the availability or reliability of electric supply to the GPUE Companies customers, and that the reasonable divestiture generation assets should enhance the availability of competitive energy supplies for the GPUE Companies' customers within PJM. We note that the instant sale has been approved by the PaPUC, and that the PaPUC has found that the sale of the GPUE Companies' generation assets will benefit consumers, is in the public interest and does not violate State law.

As noted above, consistent with our above findings, and based on our review of the market power study provided by the Company, it does not appear that this transaction raises any significant generation or transmission market power issues within the State of New Jersey or the PJM.

Therefore, for the reasons stated, the Board **HEREBY DETERMINES** that allowing the Company's New Jersey non-nuclear generation assets, including its interest in Keystone, the Met-Ed generation assets, including its interest in Conemaugh and the Penelec generation assets to become eligible facilities pursuant to Section 32 of PUHCA will benefit New Jersey consumers, is in the public interest and does not violate State law.

Finally, the Board shall reserve judgment with regards to making a final determination with respect to the net divestiture proceeds, including the Company's

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<sup>12</sup> The PaPUC has already approved Met-Ed's and Penelec's sale of their generation assets and determined each of such facilities and each of the Company's facilities to be an "eligible facility" under PUHCA. In addition, since Penelec serves approximately 13, 700 customers in New York, the New York Public Service Commission must make a similar findings for all of the plants.

treatment of the federal income tax benefits associated with the divested assets, and we **HEREBY DIRECT** the Company to: 1) file with the Board within 15 days of the closing date of the asset sale proof of closing and the net transaction cost; and 2) subsequently, the Company shall advise the Board upon receipt by the Company of a private letter ruling from the IRS regarding the treatment of the federal income tax benefits associated with the divested assets, and the Company shall within 30 days of receipt of such a ruling make a compliance filing with the Board which shall include a final proposed determination of the net divestiture proceeds, based upon actual results of the closing of the asset sale.

DATED: 11/4/99

BOARD OF PUBLIC UTILITIES  
BY:

SIGNED  
HERBERT H. TATE  
PRESIDENT

SIGNED  
CARMEN J. ARMENTI  
COMMISSIONER

SIGNED  
FREDERICK F. BUTLER  
COMMISSIONER

ATTEST: SIGNED  
MARK W. MUSSER  
SECRETARY